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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SIMON & SCHUSTER, INC.,

Petitioner,

—v.—

MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH and ANGELO PETROMELIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

May New York, by its "Son of Sam law," prohibit publishers from paying advances and royalties for the authorship of books and other expressive works about crimes, to persons accused or convicted of those crimes or who admit those crimes in those works, and require instead that such payments be made to the New York Crime Victims Board to compensate victims of these crimes, when the law (a) prohibits payment only for speech of certain specified content, leaving speech having other content outside its scope, (b) makes provision to compensate crime victims only from payments for speech, leaving crime victims to their ordinary remedies to reach all other assets of criminal tortfeasors, and (c) has in fact deterred the creation and publication of speech?

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MEMBERS OF THE NEW YORK STATE
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GEORGE L. GROBE, JR., DIANE MCGRATH,
and ANGELO PETROMELIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Simon & Schuster, Inc., petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.[1]

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix, *infra*, 1a-26a) is reported at 916 F.2d 777 (2d Cir. 1990). The decision of the District Court (27a-45a) is reported at 724 F. Supp. 170 (S.D.N.Y.

[1] Paramount Communications Inc. ("Paramount") is the corporate parent of Simon & Schuster, Inc. The only non-wholly owned subsidiary of either entity is TVX Broadcasting Group, Inc., partially owned by Paramount.

1989). The decision of the New York Crime Victims Board (46a-53a) is unreported.

JURISDICTION

The judgment of the Court of Appeals (54a) was entered on October 3, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

The First Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . . "

New York Executive Law section 632-a (McKinney 1982 and Supp. 1990), commonly known as the Son of Sam law, is reproduced in the Appendix at 55a-58a.

STATEMENT

This case arises out of Simon & Schuster's publication of the best-selling book *Wiseguy*. *Wiseguy*, widely acclaimed as a skilled, revealing, and debunking book on organized crime, was subsequently made into an equally acclaimed film by Martin Scorsese, *GoodFellas*. The New York Crime Victims Board ("the Board") has determined that New York Executive Law section 632-a prohibited Simon & Schuster from making payments to *Wiseguy*'s principal source, Henry Hill, payments without which, the record shows without contradiction, the book would never have been written. The Court of Appeals, in an opinion by Judge Miner joined in by Judge Walker, agreed that section 632-a burdens freedom of speech sufficiently to require strict scrutiny under the

First Amendment, but nonetheless upheld the constitutionality of the statute. Judge Newman dissented.

1. New York Executive Law section 632-a targets only monies earned by the exercise of the rights of free speech and free press. It applies to every contract with a person "accused" or "convicted" of a crime for a book, film, radio or television broadcast, or magazine article containing "the accused or convicted person's thoughts, feelings, opinions, or emotions" regarding the crime or containing a "reenactment" of the crime. The law prohibits any payment to the accused or convicted person for such expression. Section 632-a (1).[2]

The statute is designed to have a broad reach. Its definition of "convicted" persons includes those (like Henry Hill here) who are deemed by the Board to have "voluntarily admit[ted]" the commission of crimes in the books at issue, even though they have not been formally accused or tried and convicted. Section 632-a (5), (10)(b).[3] The statute applies to all crimes, not only crimes of

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[2] References below to publishers and books should be understood as shorthand references to all the First Amendment actors and works to which section 632-a applies.

[3] The Board's application of section 632-a to Simon & Schuster rested solely on what the Board found to be Hill's "admission [in *Wiseguy*] to . . . involvement" in crimes (50a). Henry Hill had been immunized by state and federal prosecutors for the principal events written about in *Wiseguy*, was "cooperating with state and federal prosecutors under the Federal Witness Protection Program," and was never prosecuted for them. CA App. 92. In this respect (as well as others), the New York Son of Sam law differs substantially from the federal law, 18 U.S.C. § 3681, that provides, upon conviction for certain crimes, for forfeiture by convicted criminals of proceeds from contracts for expression, by order of the sentencing judge.

violence or felonies. It encompasses federal as well state crimes.[4] The Board applies the statute even when it cannot identify or foresee the existence of any victim of the crime.[5]

The Son of Sam law requires that a publisher who enters into a contract subject to the law provide a copy of the contract to the Board and pay over to the Board any monies that would be due under it. The Board is obliged to hold any funds received for at least five years, and then to pay them to any victim who has commenced an ordinary civil tort action and recovered a judgment. If no claims are made by victims or the others benefitted by the statute, the funds are returned to the person who earned them. Section 632-a (4).

"[C]onceived in haste, written in haste, and declared under the cry of the public for the Legislature to exact retribution . . . ", *In re Johnsen (Berkowitz)*, 103 Misc. 2d 823, 430 N.Y.S.2d 904 (Sup. Ct. Kings Co. 1979), section 632-a was enacted a week after its introduction in the state legislature, amid reports (never confirmed) that members of the media were offering to pay the as-yet unidentified and unapprehended "Son of Sam" killer for the exclusive rights to his story.

Three aspects of section 632-a are particularly noteworthy. First, in furthering the state's interest in compensating victims, the law reaches only payments for expression. Section 632-a (1). Accused or convicted persons may be paid for non-expressive activities without running afoul of the statute. They may receive

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4 *St. Martin's Press v. Zweibel*, No. 12273/89 (Sup. Ct., N.Y. Co. Feb. 1, 1990), slip op. (application to Foster Winans for federal securities fraud).

5 *See In re Bernhard Goetz* (Crime Victims Board, March 13, 1988), slip op. at 5, 6 (application of law "must be determined first and without consideration of whether any victim exists").

and retain gifts, inheritances and other unearned income from any source. Crime victims are left to their ordinary remedies regarding such assets.

Second, the law prohibits payment only for expression of specified content on a specified subject: "thoughts, feelings, opinions, or emotions" concerning a crime or a "reenactment" of a crime which the accused or convicted person is said to have committed. *Id.* Payments for any other speech — for example, payments to convicted killer Jean Harris for a work about prison conditions — are not prohibited.

Third, the special attachment created by the statute is not solely for the benefit of crime victims: if no crime victim has obtained a judgment, funds held by the Board will be distributed to other judgment creditors and to state tax authorities. Section 632-a (11).

The statutory scheme raises the question whether New York's motivation to enact the statute in fact related to victims' compensation, or instead was grounded in hostility to the speech within the statute's defined scope.

2. Simon & Schuster engaged Nicholas Pileggi, an experienced journalist who had previously written articles on organized crime for *The New York Times Magazine*, *New York Magazine*, and *Reader's Digest*, to write a book about Henry Hill, an organized crime foot-soldier cooperating with federal and state prosecutors under the federal Witness Protection Program. Simon & Schuster envisioned that the book would show what working for the mob actually entailed, and would shatter the romanticized view of books like *The Godfather*. Pileggi agreed to write the book after checking with law enforcement authorities about Hill's reliability and his capability of cooperating to the extent necessary. (6-7a; Court of Appeals Appendix ("CA App.") 82-83, 92-93.)

Hill was willing to cooperate only if he were compensated for the hundreds of hours Pileggi would require him to devote to the

project. As the majority below noted, "[t]here seems to be no question that Hill would not have agreed to participate in the project without the assurance he would be paid." (6a.) Compensating such primary sources is standard publishing industry practice (CA App. 76, 85, 93-94), and so Simon & Schuster's agreement to acquire and publish *Wiseguy* was made with both Pileggi and Hill and provided for payments to both. There was no dispute in the record, and the Court of Appeals noted, that the book could not and would not have been written without Hill's paid cooperation. (6a, 26a; CA App. 83-84, 93.)

Hill was paid an advance on royalties when he signed the publishing agreement, and was promised additional royalties based on sales. In return, Pileggi received Hill's cooperation on a virtually daily basis for more than two years. Pileggi's notes of hundreds of hours of conversations with Hill — the activities for which Hill was paid — occupy more than six linear feet of files, and form the raw material on which *Wiseguy* (and later *GoodFellas*) was based. (6a; CA App. 94.)

Wiseguy was widely praised as an important contribution to the literature of criminal behavior, and was favorably reviewed by George Will, Jonathan Yardley, *The New Republic*, and the *Kansas City Star*, among many others. (CA App. 84, 172-82.) Typical of the response accorded *Wiseguy* was a review by Professor G. Robert Blakey of Notre Dame Law School, author of the RICO statute, who wrote that

> Pileggi, fortunately, had the cooperation of Hill and his wife, Karen, so his story reflects a substantial amount of insight into the personalities of the protagonist . . . *Wiseguy* is . . . a welcome addition to the popular literature on organized crime, and, fortunately, it does not unnecessarily contribute to the sensationalism, glamorizing or romanticizing of organized crime or the mob.

New York Law Journal, April 15, 1988, at 2 col. 3. Jimmy Breslin, a newspaper columnist in New York City, called *Wiseguy* "the best book on crime in America ever written." (CA App. 84, 173.)

3. After administrative proceedings, the Board found in May 1987 that Simon & Schuster had violated section 632-a by failing to turn over to the Board the publishing agreement for *Wiseguy* when it was signed in September 1981, and by paying $96,250 for Hill's account. (50a.) The Board ordered Simon & Schuster to turn over to it any additional royalties payable to Hill, and a penalty equal to the $96,250 previously paid Hill unless Hill promptly paid that sum to the Board (which Hill never did). (51a-53a.)

The Board based its administrative determination squarely on *Wiseguy*'s content. Hill was deemed subject to the statute because *Wiseguy* "contains . . . his admission to involvement in such crimes" (50a), and *Wiseguy* was deemed subject to the statute because it "contains Hill's thoughts, feelings, opinions and emotions regarding [his] crime." *Id.*

4. In August, 1987 Simon & Schuster brought this action under 42 U.S.C. § 1983 against the members of the Board, seeking declaratory and injunctive relief invalidating the Son of Sam law on its face and as applied to the payments due Hill for helping to create *Wiseguy*.

Simon & Schuster moved for summary judgment, relying on affidavits from authors, publishers, and editors establishing that the statute's prohibition on payments for certain speech had and would continue to have "the inevitable effect of reducing the total quantum of speech." *Meyer v. Grant*, 486 U.S. 414, 423 (1988). For example, the President of G.P. Putnam's Sons told how Putnam, in the autobiography of a celebrity author, had recently edited out a discussion of a youthful crime in order to avoid the

snare of a Son of Sam law. CA App. 127-28. Pileggi explained that timely paying Hill had been essential to the creation of Wiseguy, and told how he had foregone at least three specific book projects that he would have pursued but for his concern over Son of Sam law interference. CA App. 95-96. Publishers cited examples of works that would not have been published, or would have been bowdlerized, had the Son of Sam law applied at the time and place of publication, including works by Martin Luther King, Jr., Malcolm X, Lenny Bruce, Whitaker Chambers, Armand Hammer, and Abbie Hoffman. CA App. 71, 107, 126.

On October 24, 1989, the District Court upheld the law, on cross motions for summary judgment, as an "incidental" limitation on speech. The Court declined to apply strict scrutiny even though the law singled out speech for special adverse treatment and even though the law's application depends on the content and subject matter of speech and the identity of the speaker. (38a-42a.) This Court's recent holding in *Meyer v. Grant*, 486 U.S. 414 (1988), that direct restrictions on payment for speech are equivalent to direct restrictions on speech and are therefore subject to strict scrutiny, was distinguished (38a) as applying only to political speech. Simon & Schuster's showing that the law had already deterred the creation and publication of protected speech, and would continue to do so, was disregarded as "conjectural." (36a.)

5. A split panel of the Court of Appeals affirmed under a different analysis. (1a-26a.)

The Court unanimously disagreed with the District Court on the proper level of scrutiny, all members of the panel holding that the statute imposes a direct burden on free expression requiring the application of strict scrutiny. (10-13a, 19a.) Three independent reasons were given: the statute's content-based application, its "singl[ing] out the media for differential treatment," and its "effect of excluding from circulation the expression of criminals who would write about their crimes . . ." (12-13a.)

The majority nonetheless upheld the statute, finding it "narrowly tailored to serve the State's [compelling] interest in denying criminals any gain from the stories of their crimes until the victims of those crimes are fully compensated for all losses arising out of their victimization." (15a.)

Judge Newman dissented on the ground that the Board had not justified the suspect distinctions drawn by the statute (24-25a):

> When New York, understandably outraged by the prospect that a criminal might profit from a book about his crime, tries to enact a victim restitution statute that applies only to protected speech, rather than all income-producing activity, and, then, only to speech of specified content, rather than all speech, it encounters First Amendment obstacles that in my judgment are insuperable.

The dissent also found the statute ill-suited to achieve its objective, noting that the five escrow accounts established in the statute's first eleven years (three for the same victim) were "more than offset by the royalties that would have been earned on books that were not published because of this statute." (25a.)

REASONS FOR GRANTING THE PETITION

This case presents the Court with its first opportunity to address the progenitor, the most broad-reaching, and by far the most important of the approximately thirty statutes enacted after 1979 attempting, in various ways, to capture for crime victims any moneys earned by "criminals," variously defined, through writing about their crimes.[6]

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[6] The statutes are cited *infra* at 59a.

Laws restricting payments for speech, like other laws directly burdening speech, face a "well-nigh insurmountable" hurdle of justification. *Meyer v. Grant*, 486 U.S. 414, 425 (1988). Here, by upholding a statute that bars publishers from paying authors for speech, and, worse, one whose application depends on the content of the speech in question, the Court of Appeals gave lip-service to strict scrutiny while treating it as a mere form of words. This statute can pass the test of strict scrutiny only if that test is eased beyond recognition.

The weakening of the bulwark against censorship that strict scrutiny has provided is not the only reason for granting review; the judgment below will cause substantial practical harm in addition to its doctrinal damage. Because the judgment was entered by the Court of Appeals whose jurisdiction encompasses the great bulk of this nation's general book publishers, and will (as the record establishes) predictably result in repeated but unreviewable decisions by authors not to create, and by publishers not to commission and publish, works of substantial social value, this Court's review is urgently warranted.

I

THE DECISION UPHOLDING A STATUTE THAT PROHIBITS PUBLISHERS FROM COMPENSATING AUTHORS AND SOURCES FOR SPEECH AND CONCEDEDLY RESTRICTS THE CREATION AND CIRCULATION OF SPEECH CONFLICTS WITH *MEYER V. GRANT*, *CAREY V. BROWN*, AND OTHER DECISIONS

The Court of Appeals' holding that New York could constitutionally prohibit Simon & Schuster from paying Henry Hill for assisting Nicholas Pileggi in the researching and writing of *Wiseguy* conflicts sharply with two separate strands of this Court's free speech jurisprudence.

Seven times in the last fifteen years this Court has held that statutory restrictions on expenditures for speech are direct burdens on speech that are subject to strict scrutiny, and has struck those restrictions down.[7] Most recently, in *Meyer v. Grant*, 486 U.S. 414 (1988), this Court unanimously struck down a law prohibiting the proponents of an initiative from paying petition circulators who engaged in speech as they sought signatures. The Court held that the denial of payment for expressive activity constitutes a direct "burden" on that activity" which is "well-nigh" impossible to justify. *Meyer v. Grant*, 486 U.S. at 423, 425.

This Court's repeated recognition as a matter of common sense that prohibiting payments for speech must have "the inevitable effect of reducing the total quantum of speech"[8] is here reinforced by the Court of Appeals' specific finding that "the statute under attack here has the effect of excluding from circulation the expression of criminals who would write about their crimes if the price were right." (12a.) The dissent agreed that the statute "has already led to decisions not to publish books of high public interest." (24a.)

Affidavits submitted on behalf of Simon & Schuster established that *Wiseguy* would not have been created had Simon & Schuster not promised Hill timely compensation, and that if the law had been in effect at the relevant times and places other works would not have been undertaken at all or would have been altered in

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[7] *See Buckley v. Valeo*, 424 U.S. 1 (1976); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978); *Schaumberg v. Citizens For A Better Env't*, 444 U.S. 620 (1980); *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *Meyer v. Grant*, 486 U.S. 414 (1988); and *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988).

[8] *Meyer v. Grant*, 486 U.S. at 423.

content as a consequence of the law. Senior editors and officers of leading publishers described how the law would continue to result in self-censorship. *See* above at pp. 7-8.[9]

The judgment below is equally at odds with the cases presumptively forbidding regulation based on the content or subject matter of speech, or the targeting of the press when generally applicable economic legislation would suffice. Those cases require both the regulation itself and the distinctions it draws to be narrowly tailored to serve compelling state interests. For example, in *Carey v. Brown*, 447 U.S. 455, 461 (1980), this Court held that "the justifications offered for any distinctions [the statute] draws must be carefully scrutinized," and struck down a law prohibiting non-labor picketing in residential neighborhoods because the state's compelling interest in fostering residential tranquility could not justify a distinction between labor and non-labor picketing. *See also Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 586 (1983); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229-30 (1987); and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 26 (1989) (White, J., concurring) (content-based regulation "is plainly forbidden by the Press Clause of the First Amendment").

The Son of Sam law's content-based distinctions and its targeting of the media cannot be justified as narrowly tailored to meet the state's important interest in crime victims' compensation, and the Court of Appeals did not suggest otherwise. That interest would justify a generally applicable statute enhancing the ability of crime victims who obtain civil judgments to reach any payments due or assets held by the tortfeasor, regardless of source, but never a law that applies only to payments for (certain) speech.

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[9] The state made no attempt to dispute either these or any of the other affidavits establishing the statute's deterrent effect on speech.

Recognizing that crime victims' compensation cannot justify the law, the majority in the Court of Appeals offered two different rationalizations — that the statute is tailored to meet the state's interest in ensuring that victims are compensated from the proceeds of speech which "exploits" the crime (13a), and that criminals are more likely to obtain assets for victims' compensation from contracts for expression than from any other source. (15a.) In accepting these justifications, the majority skewed strict scrutiny unrecognizably.

As Judge Newman correctly observed (20-21a), by finding the statute narrowly tailored to do exactly what it does do (attaching for the benefit of crime victims only payments for certain expression), the majority side-stepped its obligation to find a compelling justification for the distinctions and press-targeting that this Court's cases make highly suspect.

The majority's circularity would render strict scrutiny toothless. Just as Illinois' statute barring only non-labor picketing outside private homes could not be justified as narrowly tailored to keep non-labor picketing from disturbing tranquility (why should Illinois not protect tranquility against all picketing?), *Carey v. Brown*, 447 U.S. at 465, so too, New York's Son of Sam law may not properly be justified as "narrowly tailored to the state's interest in denying criminals any gain from the stories of their crimes until the victims of those crimes are fully compensated for all losses arising out of their victimization." (15a.) Why should New York not assure that crime victims are compensated from all the assets in the hands of criminals, and not just payments by publishers for certain instances of the exercise of free speech rights?

The law's gerrymandered application cannot be justified by restating the interest in compensating victims as "assuring that a criminal not profit from the exploitation of his or her crime while the victims of that crime are in need of compensation . . .", thereby considering payments for speech as the "exploitation" of crime. (13a.) It is highly questionable whether speech can ever be

deemed "exploitation" of crime; certainly many works that would have been subject to the statute if it had been enacted earlier (*e.g.*, *Where Do We Go From Here* by Martin Luther King, Jr., *Soul on Ice* by Eldridge Cleaver, *The Autobiography of Malcolm X*, *Manchild in the Promised Land* by Claude Brown, and *On Civil Disobedience* by Henry David Thoreau), as well as *Wiseguy* itself, cannot meaningfully or constitutionally be treated as the "exploitation" of crime. *Cf. Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988) (protected speech cannot be treated as harmful); *Texas v. Johnson*, 109 S. Ct. 2533 (1989) (offense to public not valid justification for burdening speech).

Even assuming payment for speech could sometimes be considered the "exploitation" of crime, this law over-inclusively prohibits payment to an accused or convicted person for any work mentioning the crime, no matter how slight the mention or how unimportant in the context of an entire book. Malcolm X was already famous as a Black Muslim political leader when he wrote the compelling manifesto which is his *Autobiography*. Had the Son of Sam statute been enacted by then, he would have been prohibited for five years from receiving any of the compensation due him for the work because it also discusses the criminal activity of his youth. Such a book is hardly the exploitation of crime. New York nonetheless applies its Son of Sam law in just such circumstances, that is, to works dealing mostly with matters other than the crime. *See Children of Bedford, Inc. v. Petromelis*, 143 Misc. 2d 999, 541 N.Y.S.2d 894 (Sup. Ct. N.Y. Co. 1989) (upholding application and constitutionality of Son of Sam law), *aff'd mem.*, 556 N.Y.S.2d 483 (1st Dep't 1990), *appeal pending*.

Similarly, the payments Simon & Schuster promised to Henry Hill were for the hundreds of hours he spent with Pileggi describing in detail his life from childhood, his marriage, and his experiences with various members of organized crime, and did not "exploit" his fame and notoriety (for he had none) or "exploit" any crime victims (for as its reviewers noticed, the book does not do so, and does something else, something quite valuable, instead).

Nor does the interest in avoiding the "exploitation" of a crime until its victims are compensated explain the law's preference for other judgment creditors and state tax authorities. Section 632-a (11).

The "exploitation" justification renders the law substantially underinclusive as well. Criminals are paid for other activities made possible through the experiences they gained from their crimes (*e.g.*, those who testify and enter the witness protection program, or computer hackers who become computer security consultants and the like), but the Son of Sam law does not prohibit payment for such "exploitation."

At bottom, this formulation too (preventing "exploitation of . . . crime while the victims of that crime are in need of compensation by reason of their victimization") rests on the state's interest in compensating crime victims. Assuming that New York is offended at the thought of a criminal enjoying the proceeds of a book about a crime while the victim of the crime is left uncompensated, is it any less offensive for the criminal to enjoy the proceeds of a book about, say, prison conditions, or to enjoy the dividends from a stock portfolio, while the victim is uncompensated? Plainly not, yet New York draws precisely these distinctions, and the majority in the Court of Appeals found them justified by compelling necessity.

Nor can the statute's differential application be justified on the ground that "as a practical matter, the sole asset of most criminals is the right to tell the story of their crimes." (15a.) Such blithe and unproven assertions do not amount to compelling necessity when generally applicable regulation would serve as well without raising any censorial threat. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. at 231-33; *Carey v. Brown*, 447 U.S. at 464-69. Moreover, the legislature did not find, the state so far has not argued, and there is little reason to believe that the sole asset of most criminals — especially those likely to obtain book contracts — is the opportunity to tell their stories, as the dissent

observed. (21a.) (White-collar defendants with other assets are the most likely of criminal defendants to obtain lucrative book contracts.) In any event, as Judge Newman noted (25a), loss of income from books not published likely exceeds any payments attached by the Board. The law on balance thus works against the compensation of crime victims.

In sum, a crime victim's need for compensation extends to all the tortfeasor's assets, not just those arising from speech. If New York's existing remedies are in some respects inadequate to ensure that crime victims' tort judgments can be satisfied,[10] the First Amendment compels New York to improve those measures without singling out (certain) speech for special treatment.

II

THE QUESTION PRESENTED IS IMPORTANT BECAUSE THE JUDGMENT BELOW, UNLESS REVIEWED BY THIS COURT, WILL DETER PROTECTED SPEECH IN WAYS THAT WILL ESCAPE REVIEW

Section 632-a aborts works before they are written by deterring "criminal" writers from seeking publishing contracts for works for which they cannot be paid, by deterring publishers from seeking out and pursuing such opportunities, and by pressuring writers and publishers to delete any content which will trigger the law's application. It therefore results in self-censorship that is extremely unlikely to present itself for judicial review. Review of the

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10 The Board made no attempt to prove that the remedies afforded by traditional New York law were inadequate for crime victims or any other claimants. Simon & Schuster, by contrast, showed that those remedies had been used successfully in favor of crime victims in cases where the Son of Sam law did not apply. CA App. 108-09.

judgment below is therefore a matter of high importance if protected speech is to be protected in fact and not just in name.

Undisputed affidavits from writers and publishers established that, by prohibiting payments to writers and primary sources that are standard in the industry and enable people to devote their time to the creation and publication of books, the Son of Sam law inhibits and prevents the publication of works to which it might apply or results in their alteration. For example, "[s]ince learning of the claimed scope and legal consequences of Section 632-a", Michael Korda, Simon & Schuster's editor-in-chief, has "been compelled to make it [his] practice to reject any book that will entangle" his company in the law's reach. CA App. 86.

Random House and G.P. Putnam's Sons identified *Witness* by Whitaker Chambers, *The Essential Lenny Bruce*, Joe McGinniss' *Fatal Vision*, Robert Garwood's account of his years as a prisoner of war, *Conversations with the Enemy*, and Abbie Hoffman's *Square Dancing in the Ice Age* as among the books that mention crimes and would probably never have been published had the Son of Sam law been in effect at the time of publication. CA App. 107, 126. The editor-in-chief of Time, Inc. noted the value to readers of

> a full account of the criminal activity or, often more significant, the perspective of the alleged criminal concerning his motivation . . . [I]t is in society's interest that the views, for example, of John Dean or John Ehrlichman on the Watergate scandal; of Ivan Boesky or Martin Siegel on insider trading; of Oliver North or John Poindexter . . . on the Iran-contra affair . . . and even of Bernhard Goetz on the criminal justice system be made available to the public.

CA App. 121-22. *See also* pp. 7,8 and 11-12, *supra*.

The application of the Son of Sam law here, based not on any crime found by a court but instead on "admissions" in *Wiseguy* itself, will require publishers carefully to review autobiographies, political memoirs, collections of personal essays, and other works to consider deleting matter possibly covered by the law. If the next author of personal recollections of the civil rights movement admits, as did Martin Luther King, Jr. in his "Letter From a Birmingham Jail," to engaging in conduct possibly amounting to a criminal trespass, the publisher or author might feel compelled to delete the passage rather than hope it will escape the notice of the Crime Victims Board.

Unless the judgment below is reviewed and reversed by this Court, writers and publishers will continue to face powerful pressures to avoid projects that run afoul of the Son of Sam law. Notwithstanding the hardiness of some committed writers and publishers, so long as pursuing a book subject to the Son of Sam law requires subjection to a lengthy administrative process and possible litigation, during all of which covered payments cannot be made, writers and publishers will exercise self-censorship to avoid section 632-a, and much protected speech that would otherwise have been created and published will never see the light of day. This Court's role as final guardian of the First Amendment surely warrants review to ensure that statutes such as New York's Son of Sam law do not impose censorship inconsistent with the Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1990

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1044—August Term, 1989

(Argued March 22, 1990 Decided October 3, 1990)

Docket No. 89-9192

SIMON & SCHUSTER, INC.,

Plaintiff-Appellant,

—against—

GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH, and ANGELO PETROMELIS, individually and in their capacities as members of the New York State Crime Victims Board,

Defendants-Appellees.

Before:

NEWMAN, MINER and WALKER,

Circuit Judges.

Appeal from summary judgment entered in United States District Court for the Southern District of New York (Keenan, *J.*) dismissing action to declare unconstitutional New York statute requiring earnings of criminal

derived from exploitation of crime to be deposited in escrow account maintained by Crime Victims Board to assure payment of civil judgments later recovered by victims of exploited crime.

Affirmed.

Judge Newman dissents in a separate opinion.

RONALD S. RAUCHBERG, New York, N.Y. (Charles S. Sims, Proskauer Rose Goetz & Mendelsohn, New York, N.Y., Mark Morril, Eric Rayman, Simon & Schuster, Inc., New York, N.Y., of counsel), *for Plaintiff-Appellant*.

HOWARD L. ZWICKEL, Assistant Attorney General, New York, N.Y. (Robert Abrams, Attorney General of the State of New York, Susan L. Watson, Assistant Attorney General, New York, N.Y., of counsel), *for Defendants-Appellees*.

Leon Friedman, New York, N.Y. and Arthur Eisenberg, New York, N.Y., *filed a brief for amici curiae PEN American Center and the New York Civil Liberties Union*.

R. Bruce Rich, New York, N.Y. (Robin E. Silverman, Weil Gotshal & Manges, New York, N.Y., of counsel), *filed a brief for amicus curiae Association of American Publishers, Inc.*

MINER, *Circuit Judge*:

Plaintiff-appellant Simon & Schuster, Inc. ("Simon & Schuster") appeals from a judgment entered in the United States District Court for the Southern District of New York (Keenan, *J.*) upon an order granting the motion of defendants-appellees, Members of the New York State Crime Victims Board ("Victims Board"), for summary judgment pursuant to Fed. R. Civ. P. 56 and denying its own motion for the same relief. Simon & Schuster, a leading book publisher, brought this action to challenge the constitutionality of section 632-a of the New York Executive Law. N.Y. Exec. Law § 632-a (McKinney 1982 & Supp. 1990). Section 632-a requires that the profits derived by a criminal from the exploitation of his or her crime be deposited as earned in an escrow account maintained by the Victims Board as a means of preserving funds for the satisfaction of civil judgments later recovered by the victims of the exploited crimes. The challenge to the statute is grounded in the first and fourteenth amendments. Simon & Schuster asserts that the statute imposes a direct restriction on speech, is therefore subject to strict scrutiny, and cannot survive the scrutiny. The Victims Board contends that the provision in question does not burden freedom of speech in any way, imposes only an incidental burden if it does and, in any event, furthers a compelling state interest in a manner narrowly tailored to do so.

In granting summary judgment to the Victims Board and denying that relief to Simon & Schuster, the district court determined that "[t]he state's interest in compensating crime victims is unrelated to the suppression of free expression and any burden on free expression is

merely incidental." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 724 F. Supp. 170, 177 (S.D.N.Y. 1989). Finding the incidental burden justified by the important interest of the state in compensating the victims of crime, the district court concluded that section 632-a "is not unconstitutional on its face nor as applied to plaintiff." *Id.* at 179.

We agree with Simon & Schuster that the statute in question imposes a direct, rather than an incidental, burden on speech and that it therefore must meet the requirements of the strict scrutiny test to survive the constitutional challenge. We conclude, however, that the statute meets the test and accordingly affirm the judgment, although on grounds different from those relied on by the district court.

BACKGROUND

Originally enacted in 1977 and amended three times thereafter, section 632-a of the New York Executive Law provides that each

> legal entity contracting with any person or the representative or assignee of any person, accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the [Crime Victims B]oard and pay over to the [B]oard any moneys which would otherwise, by terms of such

> contract, be owing to the person so accused or convicted or his representatives.

N.Y. Exec. Law § 632-a(1); *see* 1977 N.Y. Laws 823; 1978 N.Y. Laws 417; 1986 N.Y. Laws 74.

The statute directs that the Victims Board deposit the monies so received "in an escrow account for the benefit of and payable to any victim or the legal representative of any victim of crimes committed by: (i) such convicted person; or (ii) by such accused person, but only if such accused person is eventually convicted of the crime." N.Y. Exec. Law § 632-a(1). To gain access to the funds, the victim must recover a money judgment in a civil action brought against the criminal within five years of the establishment of the escrow account. *Id.* Civil judgments obtained by crime victims rank third in the order of priority of claims that may be paid out of the escrow account. *Id.* § 632-a(11)(c) (McKinney Supp. 1990). According to the statute, the order of priority, from first to fifth, is as follows: attorney's fees granted by a court of competent jurisdiction for representation of the accused at any stage of the criminal proceedings and expenses allowed by the Victims Board for the production of monies paid into the escrow account, the total of such fees and expenses not to exceed one-fifth of the account; subrogation claims of the state for payments made to a victim, not to exceed one-half of the civil judgment obtained by a victim; victims' civil judgments; judgments of other creditors and claims of persons presenting lawful demands through the person accused or convicted of the crime, including the demands of tax authorities; and the claims of the person accused or convicted of the crime. *Id.* § 632-a(11)(a)-(e).

This action tests the requirements imposed by the statute upon book publishers generally and Simon & Schuster in particular. It had its genesis in a decision made at the highest levels of the Simon & Schuster organization to commission a book dealing with the life and activities of a career criminal named Henry Hill. At the time that Hill came to the attention of the publisher, he was cooperating with state and federal prosecutors under the Federal Witness Protection Program. The idea of the book was to demonstrate the pedestrian activities of a low-level member of a criminal enterprise and to dispel commonly-held romantic notions about life in a crime "family." For the project, Simon & Schuster sought out Sterling Lord, a prominent literary agent, for assistance in finding an author willing to write the book in cooperation with Hill. Lord found Nicholas Pileggi, an experienced crime writer, and ultimately negotiated a book contract subscribed by Hill, Pileggi and Simon & Schuster on September 1, 1981. An earlier agreement, dated August 21, 1981, to which Hill, Pileggi and Lord were parties, provided for the division of payments to be received from the publisher. There seems to be no question that Hill would not have agreed to participate in the project without the assurance he would be paid.

Pileggi spent more than three hundred hours with Hill, who provided the author with extensive information about his life in crime. The result of their collaboration was a popular and widely-acclaimed book, originally published by Simon & Schuster in January of 1986, bearing the title *Wiseguy*. The book describes in detail the crimes in which Hill participated during his career as a "wiseguy" or hoodlum: bribery, assault, extortion, theft, burglary, arson, drug dealing, credit card fraud and murder. Among the more celebrated

crimes in which he was involved were the theft of nearly six million dollars in cash and jewelry from the Lufthansa terminal at Kennedy airport and the bribery of Boston College basketball players. Although he served brief prison terms, Hill was prosecuted for only a few of the crimes admitted to in the book. Needless to say, there were many, many victims of the crimes committed by Henry Hill, and a great number of those victims are identified in *Wiseguy*. According to Simon & Schuster, more than 90,000 copies of the book in its trade edition have been sold, and more than one million copies of a soft cover edition, published in February of 1987, are in print.

On January 31, 1986, counsel for the Victims Board wrote to Simon & Schuster: "It has come to our attention that you may have contracted with a person accused or convicted of a crime for the payment of monies to such person." Citing section 632-a of the Executive Law, the counsel called upon the publisher to provide the Victims Board with copies of "all such contracts," the dollar amounts and dates of payments to Henry Hill, and certain other information stemming from the publication of *Wiseguy*. By letter dated May 22, 1986, Simon & Schuster provided to the Victims Board the dates and amounts of payments made by the publisher "to the Sterling Lord Agency for the account of Mr. Hill." The total of the amounts shown was $96,250. Enclosed with the letter were copies of the August 21, 1981 and September 1, 1981 agreements, as well as copies of two agreements extending the manuscript delivery date. Simon & Schuster has suspended further payments to Hill, as requested by the Victims Board.

On June 15, 1987, the Victims Board served upon Simon & Schuster a *Notice* and a *Proposed Determination and Order*. Among the proposed findings were the following: the September 1, 1981 Contract "is of the type regulated by Executive Law § 632-a" and "a copy of such Contract should have been turned over to the Crime Victims Board in 1981 at the time of execution"; the book *Wiseguy* "contains thoughts, feelings, opinions and emotions regarding crimes committed by Henry Hill as well as his admission to involvement in such crimes"; all payments to "Hill or his representatives under the Contract must be turned over to the Crime Victims Board to be held in escrow for victims of crimes committed by Henry Hill"; no payments due Nicholas Pileggi, who is a co-author and not a representative of Hill, are "subject to the mandate of Executive Law § 632-a"; and Sterling Lord is entitled to "make application to the Board for payment of necessary expenses for the production of monies paid into the escrow account to be established by the Board."

In accordance with the proposed findings, the Victims Board proposed to order that Hill pay over to the Board all monies theretofore received, plus interest, less commissions paid to Sterling Lord; that in the event Hill failed to do so, Simon & Schuster "shall turn over to the Board the total of monies it wrongfully distributed to Henry Hill"; that Simon & Schuster transfer to the Board all payments due Hill, "including the $27,958 presently held, as well as any and all future royalties or other monies that would otherwise be payable to Henry Hill or his representatives under the Contract"; and that Sterling Lord pay to the Board any monies received as Hill's representative from Simon & Schuster "as well as any other past or future monies received or to be

received from the Contract on account of Henry Hill." No fact-finding having been requested by Simon & Schuster or any other person, the *Proposed Determination and Order* became the *Final Determination and Order* of the Victims Board on July 15, 1987 in conformity with the *Notice* served by the Board.

The action giving rise to the appeal before us, brought under 42 U.S.C. § 1983 (1982) to enforce rights guaranteed by the United States Constitution, was commenced on August 3, 1987 as a consequence of the Victim Board's order. Sought in the prayer for relief in Simon & Schuster's complaint were: an order declaring section 632-a violative of the first and fourteenth amendments "on its face and as applied"; an injunction prohibiting the Victims Board "from taking any steps to apply or enforce" the statute; and an order awarding attorneys' fees pursuant to 42 U.S.C. § 1988. Some time after the filing of an Answer by the Victims Board, cross-motions for summary judgment were filed. On September 19, 1988 the motions came on for argument before Judge Keenan, who granted the motion of the Victims Board and denied the motion of Simon & Schuster in a comprehensive Opinion and Order filed on October 26, 1989.

Addressing the first amendment challenge, Judge Keenan wrote:

> Applying [*United States v. O'Brien*, 391 U.S. 367 (1968) (statute criminalizing destruction of draft card is not directed at expressive activity and imposes incidental restriction on First Amendment freedom no greater than is essential)] to section 632-a, the Court finds first that the New York state legislature acted within its authority in enact-

ing the statute. Both parties agree that victim compensation is necessary and that the most effective means of compensating crime victims should be developed. Related to this authority, then, is the important governmental interest of victim compensation. The Court has determined that this interest is unrelated to the freedom of expression. As has been discussed, the interest in compensating victims does not involve suppressing speech, but merely attaching the proceeds of that speech for the benefit of the victim.

Finally, the Court finds that any incidental restriction on the First Amendment freedom imposed by section 632-a is no greater than is essential for the government's interest in compensating crime victims. The law is drawn not to prohibit expressive activity, but to garnish the proceeds so that they will be used in a productive manner. The statute reaches only proceeds from expressive activity for the purpose of preventing a criminal from directly profiting from his or her crime.

724 F. Supp. at 178-79.

The district court also rejected Simon & Schuster's fourteenth amendment claim that the statute is overbroad and vague. That claim is not advanced on appeal.

DISCUSSION

We think that the District Court erred in testing section 632-a under the standards established in *United States v. O'Brien*. The statute addressed in *O'Brien* prohibited the destruction of draft cards and therefore was not directed at speech, although it imposed an incidental

burden on expression. The Supreme Court held that "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *O'Brien*, 391 U.S. at 376. To pass constitutional muster, a statute implicating such limitations must 1) be enacted within the constitutional power of the government, 2) further a substantial interest of government not related to suppression of free speech and 3) not impose incidental limitations greater than are essential to the governmental interest. *Id.* at 377. It is this test that the district court applied to section 632-a, despite the Supreme Court's requirement "that the governmental interest in question be unconnected to expression in order to come under *O'Brien*'s less demanding rule." *Texas v. Johnson*, 109 S. Ct. 2533, 2541 (1989).

It cannot be said that the governmental interest advanced by section 632-a bears no relation to expression, since the statute burdens directly the speech of those who wish to tell (and sell) the stories of their crimes. The possibility of a payday five years or more down the road, depending on claims against the escrow fund, can hardly be seen as providing an adequate financial incentive. Without a financial incentive to relate their criminal activities, most would-be storytellers will decline to speak or write. It is now settled that the denial of payment for expressive activity constitutes a direct burden on that activity. *Meyer v. Grant*, 486 U.S. 414, 422-24 (1988). The statute examined in *Meyer* allowed proposals to amend the Colorado constitution to be placed on the ballot at a general election if a sufficient number of people signed an initiative petition. The same statute made it a felony to pay petition circulators. The Supreme Court, after concluding that the *Meyer*

case involved a restriction subject to "exacting scrutiny," *id.* at 420, held that "[t]he Colorado statute prohibiting the payment of petition circulators imposes a burden on political expression that the State has failed to justify." *Id.* at 428.

The district court distinguished the statute examined in *Meyer* from section 632-a on the ground that the former "abridged the right to engage in political speech which is at the 'core' of the First Amendment," while the latter "has no abridging effect on political speech" and "merely functions to prevent criminals from capitalizing on their crimes." 724 F. Supp. at 177. A distinction based upon political advocacy does not seem to us to be a valid one. According to *Meyer*, the notion that the solicitation of petition signatures involves protected speech follows from *Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), a case involving regulation of the financial aspects of charitable solicitation and not core political speech. 486 U.S. at 422, n.5; *see also Riley v. National Fed'n of the Blind*, 487 U.S. 781, 787-88 (1988); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 959-60 (1984). Protected expression comes in many forms other than ideological or political speech. Indeed, the first amendment guarantee has been held to extend to the performance of musical and dramatic work. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981).

As has been demonstrated, the statute under attack here has the effect of excluding from circulation the expression of criminals who would write about their crimes if the price were right. However, "[f]or the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state

interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Section 632-a also serves to single out the media for differential treatment based on expressive content, since no assets other than those derived from the recounting of the criminal's story are subject to attachment in the manner provided by the statute. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227-31 (1987). Such differential treatment also must survive the strict scrutiny test: a state interest that is compelling and legislation narrowly constructed to accomplish its purpose. *Id.* at 231.

It cannot be gainsaid that the state has a very strong interest in preventing criminals from profiting from their crimes. *See Riggs v. Palmer*, 115 N.Y. 506, 511-12, 22 N.E. 188, 190 (1889); *cf. Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646, 2654 (1989) (governmental interest in depriving criminal of economic power derived from crime). But the state has a much stronger, indeed a compelling, interest in assuring that a criminal not profit from the exploitation of his or her crime while the victims of that crime are in need of compensation by reason of their victimization. The statute in question cannot provide assurance that all criminals will not profit from the exploitation of their wrong-doing. Even under the statute, criminals may receive payments deposited in the escrow fund by publishers if no victims come forward with claims or if funds remain after all claims are paid. A great societal interest is served, however, in barring criminals from profiting at the expense of victims who are in need of compensation and press their demands for restitution. Our society rightly deems it fundamentally unfair for a criminal to be paid for recounting the story of his or her crime while the victim

remains uncompensated for financial loss occasioned by the crime.

The compelling state interest that spawned the enactment of section 632-a by the New York legislature is revealed in the legislative history:

> Currently a person may commit a crime causing much damage and personal injury, and then gain substantial financial benefits related to resulting publicity. This bill will ensure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime for their loss and suffering. The requirement of a civil action will prevent the abuse of this privilege.

See Assembly Bill Memorandum Re: A 9019, July 15, 1977, *reprinted in* Legislative Bill Jacket, 1977 N.Y. Laws 823. The Division of Criminal Justice Services also recognized the compelling state interest in a letter of support for the legislation addressed to the Governor's counsel:

> Though hardly a new phenomenon, there has been a recent realization by the general public that where a defendant is a well-known personality or the crime with which he is charged is one that has aroused a high degree of public interest, he is in a position to make a considerable amount of money from articles, books or television accounts of his life, times and crimes. . . .
>
> [T]his bill takes cognizance of the situation and seeks to redirect the money flow from the criminal to his victims. As an expression of the concept of simple justice it cannot be faulted. It is merely another facet of the oft-repeated maxim that crime does not (or should not) pay.

See Memorandum from Robert Schlanger, Division of Criminal Justice Services, to Judah Gribetz (August 3, 1977), *reprinted in* Legislative Bill Jacket, 1977 N.Y. Laws 823.

The purpose of the statute, of course, is not to suppress speech but to assure that funds are set aside out of profits derived by criminals from the exploitation of their crimes and made available for the payment of judgments later recovered by the victims of the crimes exploited. In this way, the compelling state interest described above is served. A statute of this type has other purposes as well. It "not only prevents a criminal's unjust enrichment, but also it: (1) decreases the likelihood that society will have to support victims of crime through social programs; (2) satisfies victims' sense of justice and desire for retribution; and (3) increases the criminal's awareness of the consequences of his crime." Okuda, *Criminal Antiprofit Laws: Some Thoughts in Favor of Their Constitutionality*, 76 Calif. L. Rev. 1353, 1367 (1988) (footnotes omitted).

It seems to us that section 632-a is narrowly tailored to the State's interest in denying criminals any gain from the stories of their crimes until the victims of those crimes are fully compensated for all losses arising out of their victimization. The statute recognizes that the only way a criminal can profit directly from a specific crime involving a particular victim, other than by obtaining any proceeds of the crime itself, is by writing or talking about or reenacting it. The statute also recognizes that, as a practical matter, the sole asset of most criminals is the right to tell the story of their crimes. The first

amendment right to speak is restricted only as a consequence of their inability to profit until the victim is compensated. Section 632-a is designed to tie up the proceeds until victims have had an opportunity to make their claims for compensation. It provides a specialized form of attachment and is designed to freeze the proceeds of storytelling by criminals for the benefit of those whose misfortunes gave rise to the story.

As to Simon & Schuster's argument that New York Civil Practice Law & Rules article 62 (McKinney 1980 & Supp. 1990), the general statutory provision for attachment in New York, is sufficient to assure satisfaction of potential judgments by victims, it suffices to say that the provisions of article 62 simply are too limited to fulfill the State's interest in seeing that victims are the first to be compensated from the proceeds of crime story exploitation. While article 62, like section 632-a, serves a security purpose by requiring that property be held for satisfaction of possible future judgments, it is restricted to situations where the defendant: is a nondomiciliary residing outside New York or a foreign corporation not qualified to do business in New York; is a resident or domiciliary who cannot be served despite diligent efforts to do so; has disposed of, removed or secreted property or is about to do so, with intent to defraud creditors or frustrate a possible judgment; or is defending an action based on a judgment entitled to full faith and credit. N.Y. Civ. Prac. L. & R. 6201. Recovery by many crime victims would be rendered impossible if attachment were limited to one of these categories.

Simon & Schuster also contends that section 632-a is not well tailored because it is both underinclusive and overinclusive. It is said to be underinclusive as applied

in this case because it is addressed to only one kind of book and the royalties derived therefrom. In this connection, Simon & Schuster notes that the statute fails to reach such income as might be earned by a thief hired as a consultant for his or her expertise or received as royalties from other kinds of books. The answer to the underinclusiveness argument is that if the compelling state interest is to compensate victims of crimes out of the proceeds of the sale of stories of their victimization before anyone else benefits, the statute narrowly is drawn to do just that. The general expertise derived by a thief from a series of thefts is not the same as the tale of a specific theft committed against an identifiable victim. Payment for expertise, royalties from books that do not describe crime victims, and other income and assets of criminals may be reached in other ways. Section 632-a deals with readily identifiable, locatable funds that are most commonly available to those who victimize others.

The overinclusiveness of the statute is said to lie in its application to books in which particular crimes constitute only a small part of the subject matter, in its application to the entire proceeds due the criminal author from each book covered, and in reaching payments that constitute compensation for the labors of authorship rather than the property of the victim or the fruits of unjust enrichment. These claims of overinclusiveness must be rejected. Section 632-a does not eliminate a criminal's right to speak about a crime, nor does it prevent all payment for the story of the crime. It merely serves to tie up the proceeds of the story until the victim is able to get the first crack at the fund. This is no more than is required by the compelling state interest we have identified. That interest requires that the entire proceeds due the criminal be available to the victim, whether or

not the victim's story is a small or large part of the book. The income is derived from the notoriety of the criminal rather than from his or her labors. When that notoriety comes at the expense of a victim in need of compensation and restitution, the income so derived should be available to the victim.

CONCLUSION

We conclude that section 632-a meets the strict scrutiny test of constitutionality and affirm the judgment of the district court.

JON O. NEWMAN, *Circuit Judge*:

There are times when well-intentioned legislators, acting for the best of reasons, enact a statute that violates the Constitution. When that occurs, courts are challenged to resist the passions of the moment that swayed the legislators and to apply the paramount restrictions of the Constitution. This case presents such a challenge.

The New York legislature, responding to the public outrage over the 1977 "Son of Sam" murders and to the prospect that the killer, when apprehended, might write a book about his crimes, enacted a statute intended to prevent criminals from profiting from their crimes. *See* N.Y. Exec. Law § 632-a (McKinney 1982 & Supp. 1990). That laudable purpose, which New York is free to carry out in a variety of ways, including comprehensive victim restitution provisions, resulted in a statute that violates the First Amendment. Because the Court upholds the statute, thereby impairing First Amendment

protections and depriving the public of valuable writings about activities of high public interest, I respectfully dissent.

All members of the panel are in agreement that section 632-a imposes such a direct burden on free expression that its constitutionality is to be tested under standards of "strict scrutiny." *See Meyer v. Grant*, 486 U.S. 414 (1988). We also agree that among the components of the strict scrutiny standard in the area of free expression are requirements that the challenged statute is narrowly tailored to advance important governmental interests and that any distinction made by the statute concerning speech in general or speech of particular content must be "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end." *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987). We disagree on whether section 632-a meets these exacting tests.

The application of the statute only to speech, and, more significantly, only to speech of specified content, is beyond dispute. The statute does not require that all payments to criminals be escrowed for the benefit of crime victims; it applies only to payments made to those who write books or use other forms of communication. And, rather than apply to all payments to criminals who write books, it applies only to those payments made to criminals who write books in which they express "thoughts, feelings, opinions, or emotions" regarding their crimes. N.Y. Exec. Law § 632-a(1). The opportunity to sell books on a variety of other topics, enhanced for many criminals by the fame resulting from their crimes, is not disturbed by this statute. Thus, John Ehrlichman can write novels with no concern that his

royalties, doubtless augmented by the fame attending his Watergate crimes, will be held for five years to pay claims of victims or other creditors. The content-based application of the statute is vividly illustrated by the decision of the New York Crime Victims Compensation Board, which administers the statute, to apply it to Jean Harris's autobiography, *Stranger in Two Worlds*, because two chapters, containing primarily testimony from her trial, referred to her crime. *See Children of Bedford, Inc. v. Petromelis*, 143 Misc. 2d 999, 541 N.Y.S.2d 894 (Sup. Ct. N.Y. Cty. 1989), *aff'd*, 556 N.Y.S.2d 483 (1st Dep't 1990). Had the book concerned exclusively conditions at Bedford Hills prison, Harris's royalties, though enhanced by the notoriety of her crime, would not have been escrowed for the family of her victim.

The Court responds to the content-based discrimination of section 632-a in two ways, neither of which, in my view, is valid. First, the Court applies a legal analysis that defines the state interest being advanced in terms of the statute's scope, thereby reaching the circular result that the scope of the statute is precisely tailored to the state's objective. But the question in all such cases is whether a state, consistent with the First Amendment, can pursue its objective by focusing on speech of particular content. New York is entitled to escrow for the benefit of crime victims *all* payments to criminals. The question is whether it can escrow only payments to criminals who write books and, even if that is so, whether it can escrow only payments to criminals who write books about their crimes. To say that New York can do so because escrowing this narrow category of payments benefits crime victims, an objective New York is anxious to achieve, eliminates the entire inquiry concerning the

validity of content-based discriminations. Every content-based discrimination could be upheld by simply observing that the state is anxious to regulate the designated category of speech. It could have been said as easily in *Arkansas Writers* that the tax was valid because it achieved the state's objective of raising revenue from the category of publications within the statute's coverage. The Supreme Court, however, was not so easily satisfied, and the Arkansas tax statute that discriminated among types of publications was held to violate the First Amendment.

Next, the Court upholds the content-based discrimination on the factual ground that "as a practical matter, the sole asset of most criminals is the right to tell the story of their crimes." ____ F.2d at ____. In the first place, I doubt that this assertion is true, and I am confident that it has not been established either in the record of this case or, if it is a legislative fact, in the proceedings of the New York legislature, which held no hearings on the "Son of Sam" law. Of all criminals who might be liable for restitution, many have assets independent of the proceeds of their crimes. Crime is not exclusively an activity of the poor. And many poor criminals whose crimes involve the taking of property have at least some of that property available for restitution when they are arrested. Thus, I think it unlikely that the opportunity to write about their crimes is the sole or even principal asset of most criminals. My guess is that very few criminals have a crime story worth selling and that their number is far less than the sum of criminals with assets independent of their crime proceeds plus impoverished criminals in possession of such proceeds when arrested.

Second, and more fundamentally, even if it were true that the sole asset of most criminals is the right to tell the story of their crime, that observation would not validate New York's content-based regulation of speech. A state cannot select speech of a particular content for regulation just because such speech is a major part of an area of relevant activity that the state has elected not to regulate in full. The tax on a particular category of publications invalidated in *Arkansas Writers* would not have been saved from invalidation under the First Amendment even if the taxable revenues of the covered publications had accounted for most of the taxable revenues of all publications.

Recognizing that a content-based discrimination cannot be upheld if a legitimate state objective can be achieved by reasonably available alternative means, the Court rejects the possibility of using New York's attachment laws to secure for crime victims all profits realized by criminals, including book profits. This rejection rests on the view that New York's attachment remedies are currently too limited to be used by many crime victims. If that is so, the answer required by the First Amendment is to broaden the remedies, not to select books about crime for special regulation.

To whatever extent the majority relies on a state interest in assuaging the discomfort of victims distressed that a criminal is profiting from his crime, that interest is unavailing for several reasons. First, alleviating public outrage is not an interest that the First Amendment permits government to advance by regulating books and other forms of expression. *See Texas v. Johnson*, 109 S. Ct. 2533, 2544 (1989); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988). Second, though the

New York statute deters the publication of crime accounts by those who commit or are only accused of committing crimes and will result in preventing publication of some accounts, it does not prohibit such writings. Publishers who can find people willing to have their advance royalties escrowed for five years can still publish accounts of crime written or facilitated by the accused, and victims will still be distressed by knowing that criminals have pocketed all profits remaining after claims of victims and other creditors. Finally, the "victim outrage" interest suffers from the same defect as the "victim compensation" interest—though the interest can be validly advanced by regulating all profits of crime, it cannot be advanced, consistent with the First Amendment, by singling out books of specified content for special regulation.

In addition to the fundamental vice of a content-based regulation of speech that is underinclusive, other aspects of section 632-a render it highly offensive to the First Amendment. Subsection 632-a(1) requires a publisher to submit to the Board all contracts and payments for books within the scope of the statute to be written by those *accused* of crime, not just those convicted. Though escrowed funds will be returned in the event of an acquittal, the statute deters, and in many cases prevents, the payment of advances for covered books to all persons accused of crime, even those later determined to be innocent. Many publishers will decline to make advance payments, rather than take the risk that the author claiming to be innocent will be convicted. From the undisputed affidavits in this case, it is clear that the prohibition of such advances will deter the writing of books by many innocent persons falsely accused of crime.

Another vice of the statute is the interpretation, applied by the Board in this case, that makes a publisher liable for any payments made to an author that are later determined to be covered by the statute in the event that the author declines to turn over the payments to the Board. That threat of a retroactive liability will make publishers extremely reluctant to make advances for books even arguably within the scope of the statute, a reluctance that, according to the undisputed affidavits, has already led to decisions not to publish books of high public interest.

Furthermore, the statute's coverage of contracts and payments for books that include only a brief reference to an author's crime or even to his "thoughts" about his crime will inevitably tend to impel publishers to purge manuscripts of all material arguably within the scope of the statute in order to escape its coverage and the risk of retroactive liability. The undisputed affidavits report that this has already occurred. Such governmentally induced suppression of speech is anathema to the First Amendment.

New York understandably wishes to make sure that crime victims receive restitution from those who perpetrate crimes. To achieve that objective New York has enacted a comprehensive restitution statute, authorizing sentencing judges in every case to order restitution. N.Y. Penal Law § 60.27 (McKinney 1987). Nothing in the Constitution prevents enactment of such a comprehensive statute providing for restitution to crime victims. If that statute needs strengthening to increase its effectiveness, New York is free to adopt needed reforms. However, when New York, understandably outraged by the prospect that a criminal might profit from a book about

his crime, tries to enact a victim restitution statute that applies only to protected speech, rather than all income-producing activity, and, then, only to speech of specified content, rather than all speech, it encounters First Amendment obstacles that in my judgment are insuperable.

Moreover, this statute is ill suited even to its objective of aiding victims. In the first eleven years of its operation, it has produced just five escrow accounts, three of which involved the same criminal. What little benefit to a handful of victims has thereby been achieved is more than offset by the royalties that would have been earned on books that were not published because of this statute. Such royalties would have been available for victim restitution under New York's existing restitution statute, which is not confined to books, much less to books with specified content.

The issue of how best to secure restitution for crime victims involves policy judgments for the state legislature. Whether this statute employs a technique permitted by the First Amendment, however, is an issue ultimately to be decided by the judiciary. Any statute that has the obvious effect of preventing the publication of matters of legitimate public interest is constitutionally suspect. "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984). We do not know how many books will not be published because of the existence of the challenged statute. *Wiseguy*, the book at issue in this case, and its film adaptation, *GoodFellas*, may not be profound additions to public understanding of crime, but they are significant contri-

butions. The evidence is undisputed that observance of the requirements of the "Son of Sam" law when the book contract was first negotiated would have prevented the writing of this book. And its publisher does not engage in hyperbole by inviting us to consider whether it or any other firm would have published *Where Do We Go From Here?* by Martin Luther King, Jr., *Witness* by Whitaker Chambers, or *On Civil Disobedience* by Henry David Thoreau, had the crimes of these authors been committed in New York State while section 632-a was in effect.

From the judgment upholding the constitutionality of section 632-a, I respectfully dissent.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SIMON & SCHUSTER, INC.,

Plaintiff,

- against -

MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH, and ANGELO PETROMELIS, individually and in their official capacities,

Defendants.

87 Civ. 5582 (JFK)

OPINION AND ORDER

JOHN F. KEENAN, United States District Judge

Before the Court are plaintiff's motion and defendants' cross-motion for summary judgment. Fed. R. Civ. P. 56. Plaintiff Simon & Schuster, Inc. ("Simon & Schuster") seeks an order declaring that New York Executive Law section 632-a violates the First and Fourteenth Amendments to the United States Constitution. The Court has heard oral argument on these motions and has received numerous briefs of *amici curiae*.

BACKGROUND

At issue in this action is New York Executive Law section 632-a, commonly referred to as the "Son of Sam" law. Enacted in 1977, the purpose of section 632-a is to prevent those accused or convicted of a crime from profiting from the commercial exploitation of their crimes by contracting for the production of books, movies, magazine articles, television shows and the like in which their crime is reenacted or in which the "person's thoughts, feelings, opinions or emotions" about the crime are expressed.

The facts of this case are undisputed. In 1980, career criminal Henry Hill was arrested and charged with six counts of conspiracy to sell drugs. In 1980, Hill began to cooperate with the

Government and was put into the Federal Witness Protection Program. In 1981, Simon & Schuster began efforts to publish a book with Hill's cooperation, which would provide an inside look at organized crime in New York City. Simon & Schuster's Editor in Chief, Michael Korda, contacted the Sterling Lord Agency ("Sterling Lord"), a literary agency in New York, to find an author for such a book. The parties obtained the services of Nicholas Pileggi, a well-known author who had previously written magazine articles on organized crime and municipal corruption. On August 21, 1981, Pileggi, Hill and Sterling Lord entered into a written agreement for the creation of the book. On September 1, 1981, Simon & Schuster, Pileggi and Hill entered into a publishing agreement ("the Contract") for an autobiographical non-fiction work based on organized crime in New York City. Simon & Schuster was to pay money to Sterling Lord for the benefit of Pileggi and Hill, and the money was to be divided between Pileggi and Hill. Sterling Lord was to receive 10% of the money paid to Pileggi and Hill. The result of these transactions was *Wiseguy: Life in a Mafia Family*, which was published in January 1986 and which subsequently appeared on several best-seller lists.

By letter dated January 31, 1986, defendant the New York State Crime Victims Board ("the Board") directed Simon & Schuster to provide it with a copy of the Contract and to suspend payments to Sterling Lord. Simon & Schuster complied. On June 15, 1987, the Board served on Simon & Schuster a Proposed Determination and Order and informed Simon & Schuster of their right to a hearing. No hearing was requested by Simon & Schuster,[1] and the Proposed Determination and Order became final on July 15 1987.

The Order concluded that *Wiseguy* was subject to the regulations promulgated in section 632-a, because the book contained Hill's thoughts, feelings, opinions and emotions about

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1 Sterling Lord, however, did submit objections to the Proposed Determination and Order and requested a hearing. Petromelis Aff. ¶ 34, 35.

and admissions to his participation in criminal activities. The Board described *Wiseguy* as

> Henry Hill's life story from 1955 when he first became involved with organized crime until May 1980 when he joined the Federal Witness Protection Program. It is a veritable catalog of crimes in which Henry Hill admits to the commission of various crimes and expresses his feelings, opinions or emotions regarding such crimes.

Plaintiff's Notice of Motion, Exh. 2, ¶ 11. As a result of its review, the Board found that Simon & Schuster had violated section 632-a; a copy of the Contract should have been turned over to the Board at the time of execution for its determination as to the applicability of section 632-a. The Board found that Pileggi was a co-author, not a representative of Hill, thus he was not subject to section 632-a. Sterling Lord was found, however, to be an agent of Hill and therefore a representative under section 632-a, and was ordered to turn over to the Board its 10% share of Hill's proceeds. The Board also ordered Hill to turn over to its escrow account any money paid to him by Simon & Schuster through Sterling Lord, totaling $96,250.00. If Hill failed to turn over the money, Simon & Schuster was ordered to pay that amount to the Board. In addition, Simon & Schuster was ordered to turn over all outstanding money payable to Hill, including any future royalties payable to Hill or his representatives under the Contract.

Plaintiff then brought this action seeking declaratory and injunctive relief, asserting that section 632-a violates the First Amendment guarantee of freedom of speech and is unnecessarily vague and overbroad in violation of the Fourteenth Amendment. Plaintiff further alleges that section 632-a impairs its ability to undertake publishing contracts that arguably fall within the statute's reach. The statute thus has a chilling effect in that books concerning crime, about which the public has a right to know, will not be published. In addition, plaintiff argues that section 632-a affects

editorial decisions and will result in self-censorship of certain subjects.

DISCUSSION

A. Legislative History of Section 632-a

The legislative history of section 632-a has been thoroughly recounted in *Barrett v. Wojtowicz*, 66 A.D.2d 604, 414 N.Y.S.2d 350 (2d Dept. 1979), and will be summarized for purposes of this discussion. New York Executive Law, Article 22, sections 620-635, was enacted in 1966 and is entitled "Crime Victims Board." Section 620 contains a "Declaration of policy and legislative intent," which reads as follows:

> The legislature recognizes that many innocent persons suffer personal physical injury or death as a result of criminal acts. Such persons or their dependents may thereby suffer disability, incur financial hardships, or become dependent upon public assistance. The legislature finds and determines that there is a need for government financial assistance for such victims of crime. Accordingly, it is the legislature's intent that aid, care and support be provided by the state, as a matter of grace, for such victims of crime.

Section 622 creates a Crime Victims Compensation Board, section 623 delineates the powers of the Board, and section 629 provides the method for judicial review of the Board's decisions. Rules and regulations promulgated by the Board are set forth in Title 9 of New York Code of Rules and Regulations, Parts 525, 526 and 527.

Section 632-a was enacted in 1977 and is entitled "Distribution of Moneys Received as a Result of the Commission of a Crime." Section 632-a provides that any payments made to a criminal pursuant to a contract for the reenactment of his or her

crime through a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, be put into escrow for five years. Victims of the reenacted crime are then given five years from the creation of the escrow account in which to bring a civil action and recover a money judgment against the criminal or his representatives. *See Barrett*, 66 A.D.2d at 615, 414 N.Y.S.2d at 357. The money is held in escrow in order to ensure that the assets are preserved and that the victim's money judgment will be satisfied.

The motivation behind the enactment of section 632-a was the highly publicized sale by David Berkowitz, the "Son of Sam" serial killer, of the exclusive rights to the story concerning his crime. The bill's sponsor, New York State Senator Emmanuel R. Gold, stated,

> It is abhorrent to one's sense of justice and decency that an individual, such as the forty-four calibre killer, can expect to receive large sums of money for his story once he is captured–while five people are dead, other people were injured as a result of his conduct. This bill would make it clear that in all criminal situations, the victim must be more important than the criminal.

N.Y. Legis. Ann., 1977, at 267. *See Riggs v. Palmer*, 115 N.Y. 506 (1889) (old maxim that no one should be permitted to profit from his own crime).

It is no secret that section 632-a was enacted in hasty response to the public outcry that ensued after the David Berkowitz sale was publicized. *See Matter of Johnsen*, 103 Misc. 2d 823, 824, 430 N.Y.S.2d 904, 906 (1979). The statute has, however, been amended since its enactment. In 1978 and 1981 section 632-a was amended to clarify substantive ambiguities. L. 1978 ch. 417,

eff. Sept. 1, 1978; L. 1981 ch. 445, eff. July 7, 1981. *See Barrett*, 66 A.D.2d at 611-12, 414 N.Y.S.2d at 355. And in 1986 the legislature again made amendments to correct spelling errors and to revise subsection 11, which provides for priority of payments from the escrow account. L. 1986, c. 74, § 6.

To date, some twenty-nine other states have enacted legislation restricting revenue from crime-related books and movies. The majority of these laws are modeled after section 632-a. *See* 60 ALR 4th 1210, § 2 (listing Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Minnesota, Ohio, Oklahoma, Michigan, Nebraska, Nevada, New Jersey, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Washington and Wisconsin). In addition, state courts in New York and New Jersey have upheld the constitutionality of "Son of Sam" laws. *See In the Matter of Application of Children of Bedford, Inc.*, 541 N.Y.S.2d 894 (Sup. Ct. 1989); *Matter of Johnsen*, 103 Misc. 2d 823, 430 N.Y.S.2d 904 (Sup. Ct. 1979); *Fasching v. Kallinger*, 211 N.J. Super 26, 510 A.2d 694 (N.J.), *rev'd on other grounds*, 222 N.J. Super. 270, 546 A.2d 1094 (1988).

The fact that section 632-a and an analogous "Son of Sam" law have been found constitutional by some courts and that section 632-a has served as a model for a large number of states is indicative of the law's general acceptance in this country's legislatures and courts. Its acceptance, however, is not dispositive of its constitutionality. It is helpful to defendant's position, however, that at this time the interpretation of section 632-a is not in disarray. In addition, both parties to this action agree that the law's purpose, the compensation of crime victims, is a good one and should be furthered. The question before this Court, then, is whether this particular law is the proper method to further that purpose, and if so, whether this law is constitutional on its face and in its application.

B. First Amendment

Plaintiff asserts that section 632-a imposes unconstitutional restrictions on authors and publishers of books on crime. Plaintiff contends that section 632-a is content-based, speaker-based, that the press gets differential treatment under the statute, and that section 632-a forces editors to alter books in order to avoid the statute's restrictions, thus resulting in self-censorship. Finally, it is urged that publishers are unlawfully required to seek prior review from governmental officials before accepting a book for publishing. Plaintiff thus submits that section 632-a imposes impermissible restrictions on the First Amendment's guarantee of free speech and therefore must meet a test of strict scrutiny. The strict scrutiny test requires a showing of compelling state interest and a law narrowly tailored to fit that interest. Plaintiff argues that the mere fact that the law was passed for a beneficent purpose, compensating crime victims, does not fulfill the strict scrutiny test.

The Board responds that section 632-a does not implicate freedom of expression and that the First Amendment is not implicated at all. Accused or convicted criminals are free to write, but they are unable to directly receive profits. Section 632-a thus regulates the author's non-expressive activity rather than prohibits the author's expression. Finally, the Board asserts that the law imposes only an indirect burden on the press' ability to publish or upon an individual's decision to express his views. The Board thus submits that it is acting within constitutional restraints under section 632-a.

The Court is acutely aware of its responsibility to afford great deference to the state legislature in its law-making function. As the Supreme Court has directed, "In exercising its power to review the constitutionality of a legislative Act, a federal court should act cautiously. A ruling of unconstitutionality frustrates the intent of the elected representatives of the people. Therefore, a court should refrain from invalidating more of the statute than is necessary." *Regan v. Time, Inc.*, 104 S. Ct. 3262, 3269 (1984).

This caution is tempered, however, by the Supreme Court's recognition that with legislation concerning First Amendment freedoms "precision of drafting and clarity of purpose are essential." *Erznoznik v. City of Jacksonville*, 95 S. Ct. 2268, 2277 (1975). *See also Sable Communications of California, Inc. v. Federal Communications Commission*, 109 S. Ct. 2829, 2838 (1989) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." (quoting *Landmark Communications, Inc. v. Virginia*, 98 S. Ct. 1535, 1543 (1978)).

The Court must first determine whether the effect of section 632-a is to restrict expressive activity or whether its effect is merely to regulate the proceeds of that expressive activity.[2]

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2 Defendants urge the Court to classify plaintiff's activities, writing and publishing books, as commercial speech which is not automatically protected by the First Amendment. Defendants base their assertion on plaintiff's theory that people will not write books on crime if they are not certain of prompt payment. Defendants argue, then, that writing books concerning crime is motivated solely by financial considerations and therefore is a form of commercial speech. The Court disagrees with defendants' position and has found no authority to this effect. Courts have held consistently that the mere fact that there is an economic motivation in a person's activity does not turn the person's activity into commercial speech. *See Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 (1983); *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975); *Ginzburg v. United States*, 383 U.S. 463, 474 (1966); *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940). It would be absurd for this Court to deny First Amendment protection to the activities of book publishers and to classify books among activities such as advertising which do "no more than propose a commercial transaction." *Bolger*, 463 U.S. at 66 (quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S 748, 762 (1976)). *See* (continued...)

Once this determination is made, the Court must then decide whether to apply a standard of strict scrutiny or a lesser standard in determining the constitutionality of section 632-a.

Simon & Schuster alleges that section 632-a has a restrictive impact on First Amendment interests, and that the effect is to inhibit or prevent the publication of works of major importance which involve the subject of crime.[3] Plaintiff submits affidavits of people involved in the publishing business who allege that section 632-a "interferes with the publishing and editorial decisions of publishers and writers, and diminishes the amount of protected expression reaching the reading public by deterring the commissioning and publication of works to which it applies." Simon & Schuster Mem. at 14.

The Court recognizes that section 632-a does act as a procedural hurdle in the publishing process. Publishers may have to search harder for an accused or convicted criminal who is willing to sell his or her story without the promise of immediate payment. *See Meyer v. Grant*, 108 S. Ct. 1886, 1893 (1988) ("it is often more difficult to get people to work without compensation than it is to get them to work for pay"). But it is well accepted that freedom of speech "presupposes a willing speaker." *Virginia*

2(...continued)
also Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952) (profit motive of media does not make First Amendment inapplicable).

3 Simon & Schuster asserts that many of the following books would not have been written if section 632-a had been in effect at the time of their writing: *Autobiography of Malcolm X*, Martin Luther King Jr.'s, *Where Do We Go From Here?*, Henry David Thoreau's *On Civil Disobedience*, Eldridge Cleaver's *Soul on Ice*, Norman Mailer's *The Armies of the Night*, Jean Genet's *A Thief's Journal*, Whitaker Chamber's *Witness*, John Dean's *Blind Ambition*, and John Erlichman's *Witness to Power*.

State Board of Pharmacy, 425 U.S. at 756. Thus, although it may be more difficult for publishers and authors to create books with the cooperation of a criminal source, it is not impossible nor is such cooperation proscribed by section 632-a. The statute merely diverts the criminal source's proceeds for a time to ensure that victims may be compensated. *See Children of Bedford*, 541 N.Y.S.2d at 899.

In the instant case, *Wiseguy* was written, published and sold to thousands of readers. The Board's ruling occurred after the book's publication, resulting in the seizure of Hill's proceeds[4] and those received by Sterling Lord as Hill's representative. Pileggi and Simon & Schuster were permitted to retain their proceeds. Simon & Schuster suggests that had the Board reviewed the Contract before the book's publication, Hill never would have cooperated and thus the public would have been denied the opportunity to read this book. However, because Simon & Schuster failed to comply with section 632-a by presenting its Contract with Pileggi and Hill to the Board before making payments to Hill, we will never know whether or not Hill would have cooperated.[5]

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4 Because section 632-a's application is limited to the proceeds of expressive activity, plaintiff argues that the statute is under-inclusive. Plaintiff would like the statute to affect all of the criminal's assets. The Court is uncertain why plaintiffs present this argument. It seems that a statute that attached all of the assets of a criminal would also have the alleged effect of deterring the writing of books, which plainitff predicts. This argument is less than helpful.

5 As is demonstrated by the Board's review of the application of the subway gunman Bernhard Goetz for a determination as to whether section 632-a applies to him, a crime which is determined to be "victimless" is one which avoids the restrictions of the law. *See* Simon & Schuster Reply Mem., Exh. B. Simon (continued...)

In this regard, Simon & Schuster argues that publishers are unlawfully required to seek prior review from government officials before making payments under a publishing contract. The Court finds that the Board's review is not unlawful and that it does not prohibit expression. The Board merely determines whether section 632-a applies to a contract. It does not determine the newsworthiness or the educational value of a work. *See Regan v. Time, Inc.*, 468 U.S. 641 (1984) (regulation prohibited photographic reproductions of U.S. currency unless found to be of newsworthy or educational value); *Erznonik v. City of Jacksonville*, 422 U.S. 205 (1975) (ordinance prohibited showing of nude films at drive-ins); *Carlin Communications, Inc. v. Federal Communications Commission*, 749 F.2d 113 (2d Cir. 1984) (scheme for blocking dial-a-porn phone calls during certain hours found both under-inclusive and over-inclusive), *cert. denied*, 109 S. Ct. 305 (1988). Nor does section 632-a prohibit speech. *See Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980) (impermissible suppression of telephone bill inserts concerning controversial issues of public importance); *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (restrictions on charitable solicitations prevented persuasive speech on causes of economic, political concern); *Buckley v. Valeo*, 424 U.S. 1 (1976) (limitations on expenditures by political candidates on own behalf restricted political speech); *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988) (statute unlawfully prohibited all exit polling).

In its surreply memorandum, Simon & Schuster argues that the Supreme Court's decision in *Meyer v. Grant*, 108 S. Ct. 1886 (1988), "squarely reaffirms that a direct restriction on the ability to use non-governmental monies to pay for an activity is tantamount to a direct restriction on that activity, and must be scrutinized accordingly." Simon & Schuster Surreply Mem. at 5.

5(...continued)
& Schuster's vehement references to what "might not" be published are thus purely conjectural.

Simon & Schuster stresses a quote from *Meyer* which at first glance appears to be quite helpful to plaintiff: "the prohibition against the use of paid circulators has the inevitable effect of reducing the total quantum of speech on a public issue." *Id.* at 1892. A closer look at *Meyer*, however, shows that it is clearly distinguishable. At issue was a statute which permitted proposals for state constitutional amendments to be placed on the general election ballot if at least 5% of the total number of qualified voters signed a petition for the amendment. The statute, however, made it a felony to pay petition circulators. The Supreme Court held the statute unconstitutional in that it abridged the right to engage in political speech which is at the "core" of the First Amendment. Such a limitation on political expression subjected the statute to "exacting scrutiny." The statute thus operated directly to affect political speech. Here, section 632-a has no abridging effect on political speech. It merely functions to prevent criminals from capitalizing on their crimes.

The Supreme Court has recently found that "where speech and nonspeech elements are combined in the same course of conduct a sufficiently important governmental interest in regulating the nonspeech element can justify **incidental limitations** on First Amendment freedoms." *Texas v. Johnson*, 109 S. Ct. 2533, 2540 (1989) (emphasis added) (citing *United States v. O'Brien*, 391 U.S. 367 (1968)). Section 632-a applies to situations in which speech and nonspeech elements are combined. Although it applies only to contracts with respect to the expression of the criminal's feelings about or recollection of his or her crime, the statute's reach is not prohibitive of the expressive activity. The effect is limited to the nonexpressive element of the activity: receiving a profit. Defendants correctly rely on *Arcara v. Cloud Books, Inc.*, 106 S. Ct. 3172 (1986), to illustrate this concept. In *Arcara*, an anti-prostitution statute was used to close a bookstore in which prostitution was being practiced. The bookstore owners argued that the First Amendment prohibited the store's closing because the statute burdened their book-selling activities. The Court noted that the booksellers were free to sell their books elsewhere and that "every civil and criminal remedy imposes some conceivable burden on

First Amendment activities." 106 S. Ct. at 3177. *See also Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 586 (1983) (neither press nor booksellers may claim special protection from governmental regulations of general applicability simply by virtue of their First Amendment protected activities).

The state's interest in compensating crime victims is unrelated to the suppression of free expression and any burden on free expression is merely incidental. Section 632-a is not designed to suppress speech which it finds abhorrent or obscene, *see Sable Communications, Inc.*, 109 S. Ct. at 2836, or that the community is simply hostile to. *See Texas v. Johnson*, 109 S. Ct. at 2541. The speech itself is not the target of section 632-a; the profit-making aspect is the target. It is not necessarily abhorrent to the public to read about Hill's activities as a mobster. To many, that is a source of interest and of news value. The clearly abhorrent and repulsive aspect is that with the admission of his crimes, Hill is able to profit. The Court finds that the statute does not reflect legislative hostility to the viewpoint of an author who writes about criminal activity. The only questions for the Board in its review of a publishing contract are:

1. Is the speaker an accused or convicted criminal?

2. Does the book discuss the accused or convicted criminal's crime?

3. If the speaker is not accused or convicted, does the book contain admissions to the commission of a crime?

4. Does a victim(s) to the discussed crime(s) exist who could obtain a civil judgment against the speaker?

The Board does not employ a sliding scale to determine if the crime spoken of is more horrible than another. *See Young v. American Mini Theatres*, 427 U.S. 50, 67 (1976). All crimes for which there are victims are covered by section 632-a. This purely objective inquiry illustrates the non-hostile functioning of section 632-a.

Simon & Schuster also argues that section 632-a is speaker-based. Plaintiff relies on clearly distinguishable cases. In *First National Bank of Boston v. Bellotti*, 98 S. Ct. 1407 (1978), at issue was a Massachusetts statute that prohibited corporate bodies from making campaign contributions that would influence the vote on any question except one materially affecting the property, business, or assets of a corporation. The statute was held unconstitutional in that it prohibited certain speakers from expressing views on political issues. The Court held that "[i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *Id.* at 1420. (citing *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)). In *Bellotti*, the statute prohibited corporate speakers from addressing the public on an issue of public concern, which is different from the instant case. Likewise, in *Federal Communications Commission v. League of Women Voters*, 104 S. Ct. 3106 (1984), the Supreme Court held unconstitutional a statute which forbade a noncommercial educational broadcasting station which receives a grant from the Corporation for Public Broadcasting to "engage in editorializing." The statute was held unconstitutional in that it acted as a ban on editorializing and thus violated the First Amendment. Once again, section 632-a does not ban speech; it does not evaluate the expressions of criminal speakers based on a subjective standard; and its purpose is not to prohibit or unduly burden the dissemination of a particular type of speech.

Based on the foregoing, the Court finds that section 632-a does not directly affect expressive activity and that it is directed at nonspeech activity. As a result, the Court need not apply a test of

strict scrutiny to the statute. Instead, section 632-a is subject to the lesser standard of review as dictated by the Supreme Court in *O'Brien*. In *O'Brien*, the Supreme Court upheld a statute which criminalized the destruction of Selective Service certificates. The Court found that the destruction of the certificates was not expressive activity and that the statute was directed at nonspeech elements. The Court held that "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms," and that the statute was constitutional if it had been enacted within the constitutional power of the government, furthers an important or substantial governmental interest unrelated to the suppression of free expression, and the incidental restriction on First Amendment freedom is no greater than is essential to that governmental interest. *See O'Brien*, 391 U.S. at 376. The standard in *O'Brien* is a lesser standard than the strict scrutiny test advocated by plaintiff, which requires that the statute serve a compelling interest and that the statute be narrowly tailored to achieve the government's goals.

Applying *O'Brien* to section 632-a, the Court finds first that the New York state legislature acted within its authority in enacting the statute. Both parties agree that victim compensation is necessary and that the most effective means of compensating crime victims should be developed. Related to this authority, then, is the important governmental interest of victim compensation. The Court has determined that this interest is unrelated to the freedom of expression. As has been discussed, the interest in compensating victims does not involve suppressing speech, but merely attaching the proceeds of that speech for the benefit of the victim.

Finally, the Court finds that any incidental restriction on First Amendment freedom imposed by section 632-a is no greater than is essential for the government's interest in compensating crime victims. The law is drawn not to prohibit expressive activity, but to garnish the proceeds so that they will be used in a productive manner. The statute reaches only proceeds from expressive activity for the purpose of preventing a criminal from

directly profiting from his or her crime. The Court thus finds that section 632-a withstands the *O'Brien* test and that it is not unconstitutional on its face nor as applied to plaintiff.

C. Fourteenth Amendment

Simon & Schuster also argues that section 632-a violates the Fourteenth Amendment in that it is overbroad and vague. Simon & Schuster asserts that "[t]he blunderbuss breadth of the statute and the resulting uncertainties" give the Board the power to make enforcement decisions "without clear, neutral standards." Simon & Schuster Mem. at 64. Plaintiff relies heavily on *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*, 107 S. Ct. 2568 (1987). At issue in that case was a resolution adopted by the Board of Airport Commissioners banning "all First Amendment activities" within the central terminal area at Los Angeles International Airport. The Supreme Court found the statute to be impermissibly broad in that its sweeping ban would prohibit virtually all protected expression. The court found that every person in the airport conceivably could be held in violation of the statute and that "no conceivable governmental interest would justify such an absolute prohibition of speech." *Id.* at 2572.

Plaintiff argues that *Jews for Jesus* is on point because section 632-a applies to "every" contract or payment "with respect to" the enactment of a crime in any medium regardless of how long ago the crime occurred, or the relative importance of the crime to the book. Simon & Schuster Mem. at 60. In addition, Simon & Schuster argues that the lack of clear standards gives the Board open-ended discretion in determining the enforcement of section 632-a.

The Court finds that plaintiff's reliance on *Jews for Jesus* is misplaced. The resolution at issue in that case was indeed sweeping, overbroad and subject to discretionary enforcement. Section 632-a, however, sets forth its scope in readily discernible language. Section 632-a may not be the most carefully drafted

statute ever passed by the New York State legislature, but the constitution does not require "meticulous specificity" in order for a statute to survive a void for vagueness challenge. *See Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). The Fourteenth Amendment requires that due process be afforded in that laws provide fair warning to those within its scope, that clear standards for enforcement of the law exist, and that no law should inhibit the exercise of basic constitutional freedoms. *See Id.* at 108-09.

An inspection of the language of section 632-a indicates that plaintiff's argument must fail. First, the statute clearly delineates its application to anyone who contracts with a person "accused or convicted of a crime in this state." Section 632-a(1). "Convicted person" is further defined as "any person convicted of a crime in this state either by entry of a plea of guilty or by conviction after trial and any person who has voluntarily and intelligently admitted the commission of a crime for which such person was not prosecuted." Section 632-a(10)(b). Section 632-a also sets forth when the statute applies. It is applicable to any contract entered into with such convicted person with respect to "the reenactment of such crime by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime." Section 632-a(1). Finally, section 632-a delineates how a covered person may comply with its requirements. The statute directs such contracting person to "submit a copy of such contract to the board to pay over to the board any moneys which would otherwise, by the terms of such contract, be owing to the person so accused or convicted or his representatives." Section 632-a(1).

Plaintiff cannot argue that it was unaware that Hill fell under the application of section 632-a. *Wiseguy* was written in order to obtain an "inside look" at organized crime in New York City. Hill was known to be a long-time participant in organized crime and Simon & Schuster actively pursued his "thoughts,

feelings, opinions [and] emotions" regarding such crime. *See* Korda Aff. ¶¶ 3-6; Pileggi Aff. ¶¶ 2-4. Simon & Schuster's argument that section 632-a may apply to other expressive works that are less obvious that Hill's lacks merit. *See supra* note 5. There is no indication that section 632-a has been applied arbitrarily. The Board's determination that section 632-a did not apply to Bernhard Goetz was consistent with his acquittal on all counts but one--criminal possession of a weapon in the third degree, a class D felony. Penal L. § 265.02(4). In addition, the Board's determinations have been upheld in all but one instance. *See In re Robert Halmi, Sr.*, 128 A.D.2d 411, 512 N.Y.S.2d 650 (1st Dept. 1987).

The Court finds that section 632-a meets constitutional muster. The statute provides fair notice to those to whom it applies, it provides guidelines for compliance, and, as the Court's discussion indicates, *see supra* Part B., the statute does not inhibit the exercise of basic constitutional freedoms.

CONCLUSION

Based on the above analysis, the Court denies the plaintiff's motion for summary judgment and grants defendant's cross-motion for summary judgment. Section 632-a is constitutional under the First and Fourteenth Amendments. The Complaint is ordered dismissed, and this case is removed from the active docket of this Court.

SO ORDERED.

Dated: October 24, 1989
New York, New York

/s/

JOHN F. KEENAN
United States District Judge

Before the
STATE OF NEW YORK
CRIME VICTIMS BOARD

In the Matter of a Contract

Between

HENRY HILL and NICHOLAS PILEGGI
and SIMON & SCHUSTER

NOTICE OF PROPOSED

DETERMINATION AND ORDER

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

PLEASE TAKE NOTICE that the Crime Victims Board, State of New York has issued, pursuant to Executive Law 632-a and 9 NYCRR 526.1, the Proposed Determination and Order affixed hereto in the above-captioned matter.

This Proposed Determination and Order will become final within thirty (30) days of the date of service of this notice unless a hearing is requested in writing by an interested party. If you disagree with the Proposed Determination and/or Order, you have the right to a hearing before the Crime Victims Board prior to a final determination in this matter. A request for a hearing must be made in writing addressed to: Chairman, New York State Crime Victims Board, 97 Central Avenue, Albany, New York 12206. The request should state the reason for your disagreement with the Proposed Determination and/or Order, and your interest in the matter.

Dated: May 27th, 1987
Albany, New York

Yours very truly,

Lorraine Felegy, Counsel
New York State
Crime Victims Board
97 Central Avenue
Albany, New York 12206
518/473-9649

Before the
STATE OF NEW YORK
CRIME VICTIMS BOARD

In the Matter of a Contract

Between

HENRY HILL and NICHOLAS PILEGGI
and SIMON & SCHUSTER

PROPOSED

DETERMINATION AND ORDER

FINDINGS OF FACT

1. On or about April 27, 1980 Henry Hill was arrested in Nassau County and was charged in six indictments numbered 50764-50769 with Conspiracy to Sell Drugs.

2. In May 1980, Henry Hill entered into the federal witness protection program in exchange for his agreement that he would cooperate with various law enforcement agencies.

3. In the interest of justice the six indictments against Henry Hill were dismissed.

4. Simon & Schuster is a for-profit corporation doing business in New York State with offices located in New York City and is in the business of publishing books.

5. The Sterling Lord Agency is a literary agency with offices at 660 Madison Avenue in New York City.

6. On September 1, 1981 Simon & Schuster and Henry Hill and Nicholas Pileggi entered into a Contract known as a Publishing Agreement (hereinafter the "Contract") , copy of which is annexed hereto as Exhibit "A".

7. Under the terms of the Contract, Henry Hill and Nicholas Pileggi (jointly referred to as "Author" in the Contract), sold exclusive publishing rights to a work entitled *Wiseguy*, to be authored by Henry Hill and Vincent Pileggi, to Simon & Schuster.

8. The Contract further provides for the payment of monies by Simon & Schuster to Author, to be divided between Henry Hill and Nicholas Pileggi, pursuant to a separate agreement.

9. On August 21, 1981 Henry Hill and Nicholas Pileggi entered into an agreement (hereinafter "Agreement") whereby all monies received in the sale of a book length manuscript concerning Hill's life, to be prepared cooperatively by Hill and Pileggi were to be divided between Henry Hill and Nicholas Pileggi according to specified percentages for printed page and performance rights. The Agreement further provided that the Sterling Lord Agency was to receive and retain ten percent (10%) of any and all monies payable to Henry Hill and Nicholas Pileggi in respect to said work. The Agreement is hereto annexed as Exhibit "B".

10. The work *Wiseguy* was published in 1985.

11. The work *Wiseguy* is Henry Hill's life story from 1955 when he first became involved with organized crime until May 1980 when he joined the Federal Witness Protection Program. It is a veritable catalog of crimes in which Henry Hill admits to the commission of various crimes and expresses his feelings, opinions or emotions regarding such crimes.

12. The Crime Victims Board first became aware of the possibility of a Contract between Henry Hill and Simon & Schuster in January, 1986.

13. On January 31, 1986 the Crime Victims Board by its Counsel sent certified letters to Simon & Schuster and Nicholas Pileggi requesting that a copy of the Contract and certain other information be turned over to the Crime Victims Board pursuant to Executive Law §632-a (hereby annexed as Exhibits "C" and "D").

14. On May 27, 1986 the Crime Victims Board received a letter from Simon & Schuster, signed by John C. Bender, Group Vice President and General Counsel (annexed hereto as Exhibit "E"), which enclosed a copy of the Contract (see Exhibit "A"), a copy of the Agreement between Henry Hill and Nicholas Pileggi (see Exhibit "B") and copies of two letter amendments to the Contract (annexed hereto as Exhibits "F" and "G").

15. Based on the correspondence received on May 27, 1986 from Simon & Schuster (see Exhibit "E"), payments in the amount of $96,250.00 were made to the Sterling Lord Agency for the account of Henry Hill.

16. At present Simon & Schuster is holding approximately $27,958.00 due to be paid to Henry Hill pursuant to the Agreement.

OPINION AND ORDER

1. The Contract between Henry Hill and Nicholas Pileggi and Simon & Schuster, dated September 1, 1981 is of the type regulated by Executive Law §632-a. As such a copy of such Contract should have been turned over to the Crime Victims Board in 1981 at the time of execution for the Board's determination as to whether it came within the ambit of the Statute. At the very least, a copy of the Contract should have been turned over to the Board prior to October 10, 1984 the date of the first payment by Simon & Schuster to Sterling Lord

Agency for the account of Henry Hill. The statute and rules of the Crime Victims Board provide ample means by which a publisher may obtain a determination from the Board regarding the applicability of Executive Law §632-a to a particular Contract. These procedures include a request for an Adjudicatory Ruling (9NYCRR §525.19) by which a publisher may obtain a binding ruling based on an actual or hypothetical set of facts, a request for an advisory opinion of Counsel based upon a stipulated set of facts or circumstances, or a request for a formal Proposed Determination and Order based on submission of an actual Contract and related information (9NYCRR §526.1). By failing to turn over a copy of the Contract to the Board and by paying $96,250 to Henry Hill without seeking any determination from the Board, Simon & Schuster violated Executive Law §632-a.

2. The Board has reviewed the book entitled *Wiseguy*, authored by Henry Hill and Nicholas Pileggi pursuant to the Contract and published by Simon & Schuster, in 1985, and is of the opinion that it contains thoughts, feelings, opinions and emotions regarding crimes committed by Henry Hill as well as his admission to involvement in such crimes.

3. Nicholas Pileggi is a co-author and is not a representative of Henry Hill within the meaning of Executive Law §632-a(1) and as such no monies due or owing him are subject to the mandates of Executive Law §632-a.

4. As the Board is of the opinion that the Contract as performed is of the type described in and governed by Executive Law §632-a, all monies paid to Henry Hill or his representatives under the Contract must be turned over to the Crime Victims Board to be held in escrow for the victims of crimes committed by Henry Hill.

5. The Sterling Lord Agency as an agent of Henry Hill is deemed a representative under Executive Law Sections 621(6) and 632-a, and must also turn over any monies received or to be received under the Contract on account of Henry Hill, to the Crime Victims Board. However, the Sterling Lord Agency may, pursuant to Executive Law §632-a(8) make application to the Board for payment of necessary expenses for the production of monies paid into the escrow account to be established by the Board in this case.

Accordingly, pursuant to Executive Law §632-a it is hereby

ORDERED that Henry Hill pay over to the Crime Victims Board all monies received under the aforementioned Contract, including but not limited to the payments already received under the Contract from the Sterling Lord Agency in the amount of $96,250 (less any agent fees paid to the Sterling Lord Agency under the Agreement between Henry Hill and Nicholas Pileggi), plus any interest which has accrued on such monies from the date of receipt, along with any and all future monies due him under the Contract, such monies to be deposited in an escrow account for the benefit of and payable to any victims or the legal representative of any victim of the crimes which he admits to committing;

ORDERED that in the event Henry Hill fails to turn over to the Board monies paid to him in the amount of $96,250 (minus agent fees paid to Sterling Lord Agency) plus interest within thirty (30) days after issuance of a Final Determination and Order of the Board in this matter, that Simon & Schuster, shall turn over to the Board the total of monies it wrongfully distributed to Henry Hill through the Sterling Lord Agency, in the amount of at least $96,250 (minus agent fees paid to Sterling Lord Agency) plus interest from the date of payment;

ORDERED that Simon & Schuster turn over to the Board forthwith any and all monies payable to Henry Hill now held by Simon & Schuster, including the $27,958 presently held, as well as any and all future royalties or other monies that would otherwise be payable to Henry Hill or his representatives under the Contract.

ORDERED that the Sterling Lord Agency pay over to the Board any monies received from Simon & Schuster under the Contract as agent and representative of Henry Hill, as well as any other past or future monies received or to be received from the Contract on account of Henry Hill.

ORDERED that Simon & Schuster and the Sterling Lord Agency submit to the Board a semi-annual and cumulative accounting in a form approved by the Board setting forth a statement of any and all monies paid or payable to Henry Hill, or his representatives or assigns, derived from the work *Wiseguy*, the first semiannual report being due within thirty (30) days after issuance of the Final Determination and Order of the Board.

Dated: May 21, 1987
New York, New York

NEW YORK STATE
CRIME VICTIMS BOARD

by:

/s/
Ronald A. Zweibel
Chairman

/s/
Gennaro Fischetti
Board Member

/s/
George L. Grober, Jr.
Board Member

/s/
Diane McGrath
Board Member

/s/
Angelo Petromelis
Board Member

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of October, one thousand nine hundred and ninety.

Present: **Hon. Jon O. Newman**
Hon. Roger J. Miner
Hon. John M. Walker, Jr.

Circuit Judges,

Filed
October 3, 1990
Elaine B. Goldsmith,
Clerk

SIMON & SCHUSTER, INC.,
Plaintiff-Appellant,

- v. -

GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE McGRATH and ANGELO PETROMELIS, individually and in their capacities as members of the New York State Crime Victims Board,
Defendants-Appellees.

89-9192

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now ordered, adjudged, and decreed that the Judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this Court with costs to be taxed against the appellant.

ELAINE B. GOLDSMITH
Clerk

By: EDWARD J. GUARDARO,
Deputy Clerk

ISSUED AS MANDATE: October 26, 1990

[NEW YORK EXECUTIVE LAW]

§ 632-a. Distribution of moneys received as a result of the commission of crime

1. Every person, firm, corporation, partnership, association or other legal entity contracting with any person or the representative or assignee of any person, accused or convicted of a crime in this state, with respect to the reenactment of such crime, by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime, shall submit a copy of such contract to the board and pay over to the board any moneys which would otherwise, by terms of such contract, be owing to the person so accused or convicted or his representatives. The board shall deposit such moneys in an escrow account for the benefit of and payable to any victim or the legal representative of any victim of crimes committed by: (i) such convicted person; or (ii) by such accused person, but only if such accused person is eventually convicted of the crime and provided that such victim, within five years of the date of the establishment of such escrow account, brings a civil action in a court of competent jurisdiction and recovers a money judgment for damages against such person or his representatives.

2. The board, at least once every six months for five years from the date it receives such moneys, shall cause to have published a legal notice in newspapers of general circulation in the county wherein the crime was committed and in counties contiguous to such county advising such victims that such escrow moneys are available to satisfy money judgments pursuant to this section. For crimes committed in a county located within a city having a population of one million or more, the notice provided for in this section shall be in newspapers having general circulation in such

city. The board may, in its discretion, provide for such additional notice as it deems necessary.

3. Upon dismissal charges or acquittal of any accused person the board shall immediately pay over to such accused person the moneys in the escrow account established on behalf of such accused person.

4. Upon a showing by any convicted person that five years have elapsed from the establishment of such escrow account and further that no actions are pending against such convicted person pursuant to this section, the board shall immediately pay over any moneys in the escrow account to such person or his legal representatives.

5. For purposes of this section, a person found not guilty as a result of the defense of mental disease or defect pursuant to section 30.05 of the penal law shall be deemed to be a convicted person.

6. Whenever it is found, pursuant to article seven hundred thirty of the criminal procedure law, that a person accused of a crime is unfit to proceed as a result of mental disease or defect because such person lacks capacity to understand the proceedings against him or to assist in his own defense, the board shall bring an action of interpleader pursuant to section one thousand six of the civil practice law and rules to determine disposition of the escrow account.

7. Notwithstanding any inconsistent provision of the estates, powers and trusts law or the civil practice law and rules with respect to the timely bringing of an action, the five year period provided for in subdivision one of this section shall not begin to run until an escrow account has been established.

8. Notwithstanding the foregoing provisions of this section the board shall make payments from an escrow account to

any person accused or convicted of crime upon the order of a court of competent jurisdiction after a showing by such person that such moneys shall be used for the exclusive purpose of retaining legal representation at any stage of the criminal proceedings against such person, including the appeals process. The board may in its discretion and after notice to the victims of the crime make payments from the escrow account to a representative of any person accused or convicted of a crime for the necessary expenses of the production of the moneys paid into the escrow account, provided the board finds that such payments would be in the best interests of the victims of the crime and would not be contrary to public policy. The total of all payments made from the escrow account under this subdivision shall not exceed one-fifth of the total moneys paid into the escrow account and available to satisfy civil judgments obtained by the victims of the crime.

9. Any action taken by any person accused or convicted of a crime, whether by way of execution of a power of attorney, creation of corporate entities or otherwise, to defeat the purpose of this section shall be null and void as against the public policy of this state.

10. For purposes of this section:

(a) Victim shall mean a person who suffers personal, physical, mental, or emotional injury, or pecuniary loss as a direct result of the crime.

(b) A person convicted of a crime shall include any person convicted of a crime in this state either by entry of a plea of guilty or by conviction after trial and any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted.

11. Notwithstanding any other provision of law, claims on moneys in the escrow account shall have the following priorities:

(a) Payments ordered by the board or a court pursuant to subdivision eight of the section;

(b) Subrogation claims of the state pursuant to section six hundred thirty-four of this article in an amount not exceeding one-half of the net amount of the civil judgment obtained by a victim which is payable directly to the victim from the escrow account;

(c) Civil judgments of the victims of the crime;

(d) Other judgment creditors or persons claiming moneys through the person accused or convicted of a crime who present lawful claims, including state or local government tax authorities;

(e) The person accused or convicted of the crime.

No payment shall be made out of the escrow account where such payment would be in derogation of claims, either presented or pending, entitled to a higher priority under this subdivision. The board may bring an action of interpleader pursuant to section one thousand six of the civil practice law and rules or an action for a declaratory judgment where it cannot determine the priority of claims and the proper disposition of the escrow account.

Moneys in the escrow account shall not be subject to execution, levy, attachment or lien except in accordance with the priority of claims established in this subdivision.

12. Notwithstanding any other provisions of law, the board shall have exclusive jurisdiction and control, as escrow agent, over any moneys subject to this section. No distribution of moneys in such escrow accounts shall be made except by determination and order of the board, pursuant to the provisions of this section and the board's rules and regulations. Any party aggrieved by a final determination and order of the board under this section may seek judicial review of such decision pursuant to article seventy-eight of the civil practice law and rules.

SON OF SAM STATUTES

Ala. Code § 41-9-80 (1982)

Alaska Stat. § 12.61.020 (1984)

Ariz. Rev. Stat. Ann. § 13-4202 (Supp. 1987)

Cal. Civ. Code § 2225 (West Supp. 1988)

Colo. Rev. Stat. § 24-4.1-201 (Supp. 1987)

Conn. Gen. Stat. Ann. § 54-218 (West 1985)

Del. Code Ann. tit. 11, § 9103 (1987)

Fla. Stat. Ann. § 944.512 (West Supp. 1985)

Ga. Code Ann. § 27-3401 (1983)

Idaho Code § 19-5301 (1987)

Ill. Ann. Stat. ch. 70, para. 403 (Smith-Hurd Supp. 1988)

Ind. Code Ann. § 16-7-3.7-2 (West Supp. 1988)

Iowa Code Ann. § 910.15 (West Supp. 1988)

Kan. Stat. Ann. § 74-7319 (Supp. 1987)

Ky. Rev. Stat. Ann. § 346.165 (Baldwin 1983)

Mass. Gen. Laws Ann. ch. 258A, § 8 (West 1988)

Mich. Comp. Laws Ann. § 780.768 (West Supp. 1988)

Minn. Stat. Ann. § 611A.68 (West 1987)

Mont. Code Ann. § 53-9-104(1)(d) (1987)

Neb. Rev. Stat. § 81-1836 (1987)

Nev. Rev. Stat. § 217.265 (1986)

N.J. Stat. Ann. § 52:4B-28 (West 1986)

N.M. Stat. Ann. § 31-22-22 (1987)

N.Y. Exec. Law § 632-a (McKinney 1982 & Supp. 1988)

Or. Rev. Stat. § 147.275 (Supp. 1988)

Pa. Stat. Ann. tit. 71, § 180-7.18 (Purdon Supp. 1988)

R.I. Gen. Laws § 12-25.1-3 (Supp. 1987)

S.C. Code Ann. § 15-59-40 (Law. Co-op. Supp. 1987)

S.D. Codified Laws Ann. § 23A-28A-1 (1988)

Tenn. Code Ann. § 29-13-202 (1980)

Tex. Rev. Civ. Stat. Ann. art 8309-1, § 16
(Vernon Supp. 1987)

Wash. Rev. Code Ann. § 7.68.200 (Supp. 1988)

Wis. Stat. Ann. § 949.165 (West Supp. 1988)

Wyo. Stat. § 1-40-112(d) (1988)

18 U.S.C. § 3681 (Supp. 1989)